

REMARKS

The Examiner's communication dated February 22, 2005 has been received and carefully considered. In conformance with the applicable statutory requirements, this paper constitutes a complete reply and/or a bona fide attempt to advance the application to allowance. Specifically, claims 1, 2, 5 and 14 have been amended and claim 22 has been added. Reexamination and/or reconsideration of the application as amended are respectfully requested.

Summary of the Office Action

Claims 1, 2, 4-10, 14, 17, 20 and 21 stand rejected under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as being obvious over Komatsu et al. (U.S. Patent No. 6,776,449).

Claim 13 appears to stand rejected as being anticipated by or, in the alternative, as being obvious over Komatsu et al. Claim 13 is not identified in the first paragraph of section 2 of the Office Action, but is specifically treated in paragraph 3 of the same section. *See Office Action at pg. 2.*

Claims 11, 12, 3, 15 and 16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Komatsu et al.

Claim 19 initially appears to stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ojanen (no patent number provided) in view of Smith (U.S. Patent No. 2,806,735). However, the detailed treatment of claim 19 also cites two other references.

Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Komatsu et al. in view of Seksaria et al. (U.S. Patent No. 6,672,642).

The Claims Distinguish Patentability
Over the Reference(s) of Record

Claim 1, as amended, calls for a tailgate assembly mounted along an open edge of a vehicle's load-carrying bed. The Examiner rejected claim 1, prior to the present amendment to claim 1, by applying Komatsu et al. (hereinafter, "Komatsu"). The Examiner stated that Komatsu discloses a tailgate assembly comprising a metal frame 3 having a reinforced cross-sectional shape. *Office Action at pg. 2.* Komatsu more particularly relates to a vehicle door having a window that is usable as a tailgate. *Komatsu at Col. 1, lines 6-9 and Fig. 1.* Komatsu does not relate to a tailgate assembly

mounted along an open edge of a vehicle's open load-carrying bed, which is the type of tailgate assembly called for in claim 1.

Moreover, claim 1 has been amended to call for the tailgate assembly to comprise a frame pivotally connected to a wall forming the vehicle's open load carrying bed. The tailgate 1 of Komatsu is a door to a vehicle's passenger compartment. See *Fig. 9 of Komatsu*. Thus, there is no pivotal connection of a frame to a wall forming a vehicle's open load-carrying bed in Komatsu, as called for in claim 1. In fact, there is no open load-carrying bed in Komatsu. Accordingly, Komatsu fails to meet this limitation.

In addition, claim 1 has been amended to call for a windowless skin to be attached to an outer side of the frame. The windowless skin limitation highlights one of the structural distinctions between a door, such as tailgate 1 of Komatsu, used to enter a passenger compartment that allows passengers in the compartment to see through a portion of the door (i.e., the door's window) and a tailgate, such as called for in claim 1, that is mounted along an open edge of a vehicle's open load-carrying bed. Since the outer panel 2, asserted by the Examiner as the "skin" called for in claim 1, includes a window, Applicant asserts that Komatsu fails to disclose or fairly suggest the limitation contained in claim 1 calling for a windowless skin.

For at least these reasons, Applicant respectfully asserts that claim 1 and claims 2-12 dependent therefrom distinguish patentably over the references of record.

Dependent **claim 4** calls for the structural cladding of claim 2 to be formed of a sheet molding compound which enables the cladding to be relatively lightweight. The Examiner rejects claim 4 over Komatsu stating "Komatsu et al. discloses the tailgate assembly of claim 2 wherein the structural cladding (4) [is, sic] formed of sheet molding compound (column 8, line 53) which enables the cladding to be relatively lightweight." *Office Action* at pg. 3. As discussed in more detail below, Komatsu discloses element 4, referred to as a module plate, as being made of a metal plate. See *Komatsu* at col. 8, lines 28-30. Column 8, lines 52-53, which includes the line (line 53) cited by the Examiner, states that "[t]he module plate 4 is formed by folding work, blanking work, and so on of a sheet metal and its entire shape is in a substantially T-shape. *Id.* (*emphasis added*). There is no disclosure or fair suggestion in Komatsu of a tailgate assembly including a structural cladding formed of a sheet molding compound.

Dependent **claim 7** calls for the skin of claim 1 to be connected to the frame of claim 1 via welding. Applicant continues to question the Examiner's treatment of claim 7 as a product-by-process claim, particularly when claim 7 further limits the type of

attachment between two structural elements introduced in claim 1 (which is directed to a tailgate assembly). Nonetheless, even when treated as a product-by-process claim, the MPEP requires the Examiner to consider any structure implied by the process steps when assessing the patentability of product-by-process claims over the prior art, particularly where the manufacturing process steps would be expected to impart distinctive structural characteristics to the final product.” See *MPEP* §2113. The specific example provided in *MPEP* §2113 relates to welding and holds that terms such as “welded” are capable of construction as structural limitations. *Id. citing In re Garnero*, 412 F.2d 276, 279, 162 USPQ 221, 223 (CCPA 1979). Thus, Applicant asserts that the Examiner cannot summarily dismiss the limitation in claim 7 calling for the skin to be attached to the frame via welding, because welding implies a specific structural characteristic, i.e., how the skin is attached to the frame. Applicant further asserts that, because the references of record fail to disclose or fairly suggest a skin attached to a frame via welding, claim 7 is patentably distinct over the references of record for this reason, in addition to depending from a claim, claim 1, that is also asserted as being patentably distinct over the references of record.

Dependent **claim 9** calls for a cap connected to the cladding of claim 2 and the skin of claim 1 over a top side of the frame of claim 1. The Examiner states the Komatsu discloses “a cap (6) connected to cladding (4) and skin [2] along a top side of the frame (3 – the cap (60 joins the cladding and the skin along a top side (an upper portion) of the frame (3)).” (emphasis added) *Office Action* at pg. 4. The Examiner appears to be forcing the proverbial square peg in a round hole, i.e., the Examiner makes a very tenuous argument to reject claim 9 over Komatsu. Claim 9 clearly calls for the cap to connect the cladding and the skin over a top side of the frame, not along a top side or an upper portion of the frame. With reference to figures 1 and 5 of Komatsu, it is clear that the alleged cap 6 is merely disposed over the module plate 4 and the outer panel 2 along or over the edge of outer panel 2 defining a window therethrough. The alleged frame 3 outlines the entire outer panel 2; thus, the lining 6 is not received over a top side of a frame, as required by claim 9. Applicant asserts that claim 9 is patentably distinct over the references of record, not only because claim 9 depends from claim 1 which is asserted as being allowable, but for this additional reason.

Claim 13 calls for a sheet molding compound structural cladding adjacent and connected to a raised section of the frame. The Examiner asserts that Komatsu

discloses "a sheet molding compound structural cladding (4) adjacent and connected to the raised section (Fig. 3) of the frame (3)." *Office Action* at pgs. 2-3. The specification of Komatsu, however, fails to support the Examiner's contention. Specifically, Komatsu discloses "a module plate 4 serving as a reinforcing member, which is connected to the outer panel and inner panel 3." *Komatsu* at Col. 8, lines 22-23. Komatsu further states that "[t]he outer panel 2, the inner panel 3, and the module plate 4 are made of metal plates...." *Id.* at Col. 8, lines 28-30 (*emphasis added*). Applicant asserts that a metal module plate does not disclose or fairly suggest a sheet molding compound structural cladding.

As Applicant brought to the Examiner's attention in response to the Examiner's first Office Action (see *Response to Office Action of December 14, 2004* at pg. 11), sheet molding compound ("SMC") is generally defined as a ready-to-mold material system that combines the reinforcement, thermosetting resin, fillers, pigments, catalysts, and other additives in a continuous sheet that is formable into complex shapes in a single molding step with minimal scrap material. 21 *Kirk-Othmer, Encyclopedia of Chemical Technology* 199 (4th ed. 1997). While this exact definition of SMC should not be read into claim 13, it is provided as background information for the Examiner and supports Applicant's assertion that the metal module plate 4 of Komatsu fails to disclose or fairly suggest a sheet molding compound structural cladding, i.e., a metal plate is not a sheet molding compound structural cladding.

Accordingly, Applicant respectfully submits that claim 13 and claims 14-18 dependent therefrom are patentably distinct over the references of record.

Dependent **claim 15** calls for the structural cladding of claim 14 to include a corrugated section for spreading any load applied thereto to the frame. The Examiner concedes the Komatsu fails to disclose structural cladding including a corrugated section, but asserts that it would have been obvious to one of ordinary skill in the art to include a corrugated section on the cladding 4. *Office Action* at pg. 5. The Examiner further asserts that the motivation to include such a corrugated section "would have been to increase the rigidity of the cladding." *Id.* Applicant respectfully disagrees.

Applicant asserts that the Examiner's conclusory statement that one skilled in the art would be motivated to modify the module plate 4 to include a corrugated section to increase the rigidity thereof is disingenuous. The module plate 4 of Komatsu is disposed between the outer panel 2 and the liner 6. See *Fig. 5 of Komatsu*. The corrugated section of the structural cladding of claim 15 enables the structural cladding

to receive a load directly thereon and to spread such a load to the frame. The module plate 4 of Komatsu is an internal component of the tailgate 1. No load would ever be applied directly to the module plate because the liner 6 and the outer panel 2 entirely enclose the module plate 4. Thus, Applicant asserts that no one skilled in the art would be motivated to add a corrugated section to the module plate 4.

Accordingly, Applicant asserts that claim 15 defines patentably over the references of record, not only because claim 15 depends from claim 13 (asserted to be patentably distinct over the references of record), but also because the Examiner has provided insufficient motivation to modify Komatsu to meet the limitations of claim 15.

Dependent **claim 16** calls for the corrugated section of claim 15 to be generally located in an area defined inside the raised section of claim 13. This limitation of claim 16 appears to have been entirely ignored by the Examiner in the Office Action to which this paper is responsive. There is not even an allegation or assertion that a corrugated section generally located in an area defined inside a raised section is disclosed or suggested by Komatsu. Accordingly, examination of this claim is respectfully requested, including, if its rejection is maintained, a detailed explanation of how this limitation (relating to the location of the corrugated section) is met by Komatsu. Applicant further submits that any continued substantive rejection of this claim should not be made final because Applicant has yet to given an opportunity to fairly respond to the Examiner's rejection of this claim.

It is entirely unclear as to what combination of references are being used by the Examiner to reject **Claim 19** under §103(a). Section 6 of the Office Action initially indicates that claim 19 is “unpatentable over Ojanen in view of Smith (US Patent 2,806,735).” *Office Action* at pg. 5. Ojanen is not further identified anywhere in the Office Action and no specific patent or other reference number is provided. Applicant notes that patent publication no. WO 02/066313A1 to Ojanen was applied in the previous Office Action, but due to the remaining inconsistencies in the treatment of paragraph 19 Applicant will not speculate as to whether this is the reference the Examiner intended to use to reject claim 19.

Section 6 further states that “Smith discloses a tailgate which pivots about a horizontal axis and a vertical axis.” *Office Action* at pg. 6. Next, the Examiner states that “Komatsu et al. and Harper are analogous art because they are from the same field of endeavor, i.e., tailgates.” *Id.* Like Ojanen, no patent or other reference number is provided with the Examiner’s reference to “Harper”. Lastly, section 6 states that “it

would have been obvious to combine Smith with Komatsu et al. to obtain the invention as specified in claim 19." *Id.* Thus, four (4) different references are referred to in section 6 of the Office Action and how these four references are interrelated or combinable is completely unclear. In view of the many ambiguities contained in the Examiner's treatment of claim 19, Applicant respectfully requests reexamination of claim 19 and a better indication of the exact references being applied thereagainst. Applicant further submits that any continued substantive rejection of this claim should not be made final because Applicant has yet to given an opportunity to fairly respond to the Examiner's rejection of this claim.

CONCLUSION

All formal and informal matters having been addressed, it is respectfully submitted that this application is in condition for allowance. It is believed that the claim changes clearly place the application in condition for allowance, defining over any fair teaching attributable to the references of record. Alternatively, if the Examiner is of the view that the application is not in clear condition for allowance, it is requested that the Examiner telephone the undersigned for purposes of conducting a telephone interview to resolve any outstanding differences. Accordingly, an early notice of allowance is earnestly solicited.

Respectfully submitted,

FAY, SHARPE, FAGAN,
MINNICH & MCKEE, LLP



Christopher B. Fagan, Reg. No. 22,987
Erik J. Overberger, Reg. No. 48,556
1100 Superior Avenue
7th Floor
Cleveland, Ohio 44114-2579
(216) 861-5582

May 19, 2005

Date

Certificate of Mailing

Under 37 C.F.R. § 1.8, I certify that this Amendment is being

- deposited with the United States Postal Service as First Class mail, addressed to: MAIL STOP AMENDMENT, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date indicated below.
- transmitted via facsimile in accordance with 37 C.F.R. § 1.8 on the date indicated below.
- deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. 1.10 on the date indicated below and is addressed to: MAIL STOP AMENDMENT, Commissioner For Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

| | |
|-------------------------|--|
| Express Mail Label No.: | Signature |
| |  |
| Date | Printed Name |
| May 19, 2005 | Audrey M. Dragony |

FILENAME \p N:\HONZ\200012\AMD0004084V001.doc